Supreme Court, U.S.
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No. 94-1525

In The

Supreme Court of the United States

October Term, 1994

RICHARD L. BARNYAK,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. COUNTERSTATEMENT OF THE CASE

A. Procedural History

Petitioner was charged at Criminal Information No. 1990-565 (Centre County, Pennsylvania) with Attempted Murder (First and Third Degrees), Aggravated Assault, Simple Assault, Recklessly Endangering Another Person and Terroristic Threats in connection with an incident occurring in the trailer he shared with his then-paramour Kathy Dixon. Following preliminary hearing at which both Kathy Dixon and her son Douglas Bumbarger testified, and at which Petitioner, represented by counsel, extensively cross-examined both, he was held for court on all charges.

Shortly after his preliminary hearing, Petitioner married Kathy Dixon and retained new counsel. 'Independent' counsel was procured for Kathy Dixon Barnyak and that counsel, in pleadings filed jointly with Petitioner's counsel, thereafter filed a series of legal challenges to Kathy Dixon's legal capacity to testify against Petitioner, citing a "marital privilege" specifically abolished under Pennsylvania statutory law for cases where violence is directed against another family member. After many months of these challenges, 'independent' counsel was also procured for Douglas Bumbarger to assert an equally non-existent "privilege" on his behalf not to testify against Petitioner.

Petitioner was ultimately tried on the charges before a jury on March 11, 1991. At his trial, both Kathy Dixon

and Douglas Bumbarger refused to testify when called. They were apprised by the trial court that they lacked any legal privilege to do so, were ordered to testify and upon continued refusal were briefly jailed for contempt of court. The case then proceeded with Commonwealth eyewitness Raymond Smeal as to events of the incident in question, various witnesses to physical evidence and testimony relative to the Petitioner's admissions to police, together with *res gestae* statements made to hospital personnel and the responding State Police troopers by Kathy Barnyak and Douglas Bumbarger.

The jury verdict returned found Petitioner not guilty of Attempted Murder but guilty of all remaining offenses charged. Post-verdict motions were filed, argued and subsequently denied, Petitioner was sentenced pursuant to mandatory sentencing provisions applicable in Pennsylvania to Aggravated Assault committed while in possession of a firearm, and appeal was taken to the Superior Court of Pennsylvania. An initial Memorandum Panel Opinion of that Court was withdrawn upon the Commonwealth's Application for Reargument, and on January 25, 1994, in a published Opinion authored by President Judge Rowley of the Superior Court of Pennsylvania, Petitioner's convictions and sentence were upheld. Petitioner's subsequent Application for Reargument was denied by the Superior Court of Pennsylvania and his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was also denied.

B. Misleading Statements in Petitioner's Petition for Writ of Certiorari

Petitioner, at page 4 of his Petition for Writ of Certiorari filed with this Honorable Court, makes the following assertion:

> The trial court instructed the jury that before it could find Petitioner guilty of any of the counts charging him with aggravated assault or one of the two counts charging him with simple assault, it had to find that Petitioner acted "intentional[ly]", . . . Thus, the issue joined at trial was whether Petitioner intentionally shot Ms. Dixon.

Contrary to Petitioner's assertion to this Court, it was *not* required that the jury have found that Petitioner acted intentionally for any of the three (3) offenses. Aggravated Assault, 18 Pa.C.S.A. §2702(a)(1) includes the causing of serious bodily injury "intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life" (Count 3). Aggravated Assault, 18 Pa.C.S.A. §2702(a)(4) includes the causing of bodily injury "intentionally or knowingly" with a deadly weapon (Count 4) and Simple Assault, 18 Pa.C.S.A. §2701(a)(1), includes the causing of bodily injury "intentionally, knowingly or recklessly" (Count 6). There is therefore no merit to Petitioner's contention that the sole issue before the jury was one of intent. The trial jury apparently gave Petitioner the benefit of any doubt as to his intent to *commit murder.* They may well have concluded that Petitioner fully intended to cause serious bodily injury but they need not have done so in order to

have properly convicted him under the Aggravated and Simple Assault counts.

C. Factual History

Briefly stated, the facts of this incident are as follows. Petitioner and Kathy Dixon became embroiled, on April 20, 1990, in an argument at their shared trailer over another woman. Present at the time were Dixon's son, Douglas Bumbarger, and a cousin, Raymond Smeal. Verbal barrages turned violent, as Petitioner swept kitchen appliances and sundries from their places onto the floor. The argument went from the dining area of the small trailer to the rear area where Petitioner's bedroom and a bathroom were situated at 90 degree angles to each other. Bumbarger attempted to intervene between his mother and Petitioner, who were engaged in a hair-pulling session in the rear of the trailer. Bumbarger was grabbed by Petitioner, who stated "I'm going to kill you all". Petitioner then moved into the bedroom and closed the door. Kathy Dixon, fearing the violence that was soon to erupt, clutched the bedroom doorknob and held the door shut with one arm extended, while displacing the rest of her body off to the side into the entrance to the bathroom. This maneuver was briefly successful (Dixon being significantly larger than Petitioner), as Petitioner then fired a series of carefully-placed shots in an upward pattern through the bedroom door. When the door remained immovable, the Petitioner then fired an additional shot next to the doorknob, hitting Kathy Dixon in the hand and causing her to cry out, thereby disclosing her position to be off to the right and partially into the bathroom. Petitioner then fired his remaining shot in that direction,

through the wall and into the bathroom. Petitioner then alighted from the bedroom with a smile on his face and told all present to get out of the trailer.

Bumbarger grabbed his mother and he, she and Raymond Smeal rushed to a nearby hospital. There Dixon was treated and she, Bumbarger and Smeal were interviewed by Trooper Yuhouse. Yuhouse indicated that at the time he interviewed the three, all were visibly excited and upset. Medical personnel also testified to statements made by Dixon at the hospital.

Following the departure of the victim, Petitioner placed the gun used in the incident in a camping trailer on his father's adjoining property, made no attempt to ascertain the whereabouts or condition of Dixon and, by his account, continued to drink alcohol at his trailer. Police, with the aid of Petitioner's brother, recovered the weapon, a .44 magnum handgun, and subsequently arrested Petitioner.

In *Mirandized* statements found to have been wholly voluntary by the trial court, Petitioner admitted the incident, contending that he meant to scare Dixon but not to shoot her, conceded the order and positioning of the shots and that he had fired the last shot into the bathroom after hearing Kathy Dixon screaming. Petitioner contended that he had been standing six to seven feet away from the bedroom door when the shots were fired. However, at trial Petitioner produced the actual door in court, and the clearly apparent powder burns on it suggested that the shots had been fired at much closer range. In his trial testimony, Petitioner acknowledged that the scraping abrasions found on the arm Kathy Dixon had

used to hold the door closed were consistent with his having tried to pull the door open prior to the shot which hit her hand, and that his final shot into the bathroom would have been at chest height for someone of Dixon's size. Petitioner contended he had just shot "as fast as I could". Other testimony established that the shots had been "staggered", with pauses between the shots.

II. SUMMARY OF ARGUMENT

Petitioner has never before raised a federal question, constitutionally-based or otherwise, in any state court proceeding, and has accordingly failed to preserve any federal question for review by this Honorable Court.

It is, moreover, abundantly clear that even in the absence of waiver, Petitioner's instant Petition raises no federal question. Petitioner's underlying contention continues to be that state courts, applying Pennsylvania appellate caselaw, simply reached the "wrong conclusion" when they determined that the statements admitted as *res gestae* at his trial did, in fact, qualify as *res gestae* under state law. This contention has been fully litigated and determined adversely to Petitioner's position by the highest state court in which review was available as of right, and discretionary review of that decision was declined by the Supreme Court of Pennsylvania.

Petitioner attempts to "construct" a federal question where clearly none exists by asking this Honorable Court to first *assume* that all state decisions were incorrect, to then further *assume* that a question was "left open" in this Court's own precedent which was in fact neither raised

nor implicated in that precedent, and as a result to afford review via Writ of Certiorari.

The Commonwealth of Pennsylvania is aware of no caselaw which would suggest that this Honorable Court should afford discretionary review of evidentiary decisions made by trial courts applying state law, which have been fully reviewed and upheld by that state's appellate courts. Nor, most certainly, is it aware of any such law which would suggest that a litigant may pursue his case from trial level through all levels of state appellate process to final determination, continuously eschewing the raising of any "federal question", and then expect that upon filing a Petition for Writ of Certiorari to this Court and constructing such a question, that this Court will issue a Writ of Certiorari to a state Court upon the basis of an issue at no time presented to that Court.

The Petitioner in this case offers no legal basis which would render exercise of discretionary review by this Court appropriate and the Commonwealth accordingly requests that the Petition for Writ of Certiorari be denied by this Honorable Court.

III. ARGUMENT

THE PETITIONER IN THIS CASE HAS FAILED TO PRESERVE THE ISSUE PRESENTED IN ANY PRIOR PROCEEDING IN STATE COURTS, FAILS TO PRESENT A FEDERAL QUESTION EVEN IN THE INSTANT PETITION, AND SETS FORTH NO ASSERTION WHICH WOULD WARRANT DISCRETIONARY REVIEW BY THIS HONORABLE COURT

A. Failure to Preserve Issue in State Courts.

A Writ of Certiorari to a state court issues to review the propriety of the state court's decision upon a particular issue presented to it. Clearly, a Writ directed to a state court upon an issue never raised in that court would be both improper and nonsensical. The Petitioner in this case at no time in *any* prior proceeding, trial or appellate, before the courts of Pennsylvania, ever suggested the presence of the "federal question" posited in this case, much less briefed or otherwise pursued such issue. Petitioner seeks not discretionary review of state court action relative to a federal question, but adjudication of his claim by this Honorable Court in the first instance.

Petitioner's claims raised before the Superior Court of Pennsylvania on direct appeal were:

1) Whether the trial court erred in determining which statements at trial qualified under the *res gestae* exception, applying Pennsylvania law;

2) Whether the trial court erred in refusing to quash the subpoena issued to Kathy Dixon Barnyak;

3) Inconsistency of verdicts;

4) Whether the trial court erred in admitting certain firearms at trial;

5) Adequacy of notice to Petitioner of the Commonwealth's intent to invoke mandatory sentencing provisions.

No federal question was raised, directly or by implication, with respect to *res gestae* statements admitted at trial.

On reargument, Petitioner's issues presented were:

1) Error by appellate court on inconsistent verdicts issue;

2) Error by appellate court on quashal of subpoena issue;

3) Error by appellate court as to what constituted proper *res gestae* statements, applying Pennsylvania law.

Again, no federal question was raised, directly or by implication, with respect to *res gestae* statements admitted at trial.

In seeking discretionary review by the Supreme Court of Pennsylvania, Petitioner presented the following issues:

1) Due process arguments (state and federal) on the inconsistent verdicts issue;

2) Error by the lower appellate court and trial court on quashal of subpoena issue;

3) Error by lower appellate court as to what constituted *res gestae* statements, applying Pennsylvania law.

A third time, no federal question was raised, directly or by implication, with respect to *res gestae* statements admitted at trial.

Petitioner attempts to quickly gloss over his ongoing failure to present the instant issue for review by any prior state court in a brief footnote at page 2 of his Petition, to the effect that it was not necessary that he invoke "talismanic [sic] phrases" to obtain federal review. Petitioner's argument appears to be that because he contested the accuracy of the trial court's determination that the statements were *res gestae*, applying state law, that he must needs therefore have raised not only violations of his federal Constitutional right of confrontation but also arguments based upon this Honorable Court's decision in *White v. Illinois*, 502 U.S. ___, 116 L.Ed.2d 848, 112 S.Ct. 736 (1992). Such a proposition is patently preposterous and in no way serves to suggest that any of these matters were colorably raised in any state court.

Rule 14 of the Rules of this Honorable Court, at subsection "h", provides, *inter alia*, as follows:

> (h) If review of a judgment of a state court is sought, the statement of the case *shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts;* and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . *as will show that the federal question was timely and properly raised*

> *so as to give this Court jurisdiction* to review the judgment on a Writ of Certiorari . . .
>
> (Emphasis Supplied)

Petitioner's instant submission fails utterly to comply with the foregoing requirements. Nor could it do so, since the necessary procedural steps to preserve this issue were never taken. Where the issue sought to be "reviewed" by this Court has never been presented to the courts whose decisions are to be scrutinized, a Writ of Certiorari is clearly inappropriate.

B. Failure to state a federal question. (Request to have this Honorable Court re-evaluate decisions of State Courts premised solely upon State Law)

It is clear that Petitioner's issue is in no event indicative of a Federal Question, even had he taken the necessary steps to preserve it for review. Petitioner has at all times premised his challenge to admission of the *res gestae* statements not upon the basis that they violated his federal right of confrontation, nor upon any other federal issue, but upon the sole basis that the *state courts misapplied state law* in deeming the statements *res gestae*.

However zealously he attempts to convert this argument to a "federal question", what Petitioner in fact seeks is for this Court to substitute its own evaluation of the *res gestae* nature of the statements for that of the state courts; or, better yet, simply to *assume* that those determinations based upon state law were incorrect: " . . . whether a hearsay statement *improperly* admitted under the excited utterance exception violates the Confrontation Clause."

[Petitioner's Question Presented for Review]. Implicit in this question is the necessity for this Court to reach a determination that the statements *were* "improperly" admitted, applying *state law.* This determination has already been made and subjected to appellate review in state courts, with an outcome adverse to the Petitioner's position.

C. Misplaced reliance upon *White v. Illinois* as authority for grant of Writ of Certiorari

The issue presented to this Honorable Court in *White v. Illinois,* 502 U.S. ___, 116 L.Ed.2d 848, 112 S.Ct. 736 (1992) was whether the Commonwealth need establish the "unavailability" of a witness prior to admission of that witness' out-of-court statements which fall squarely within well-recognized exceptions to the hearsay rule (in that case, *res gestae* utterances and statements made for the purpose of medical diagnosis). This Honorable Court, in an Opinion authored by Chief Justice Rehnquist, found that no showing of "unavailability" was required, since such statements had an unusually high degree of inherent reliability, indicating that their exclusion upon the basis of the federal Confrontation Clause would be "the height of wrong-headedness".

Nowhere in the *White* Opinion is there to be found the slightest reference to this Honorable Court's having "left open" the question of whether "improper" admission of hearsay under the *res gestae* exception would violate the Confrontation Clause. Such question seems, rather, to have arisen full-blown at page 9 of Petitioner's instant Petition, for purposes of expediency in seeking

review before this Court. Assuming, *arguendo*, that such a violation would lie, Petitioner must first have preserved the issue for review, which he has not, and secondly the statements must have been "improperly" admitted, a determination to be made solely by reference to state law, by state courts, and which in this case has finally been made adversely to Petitioner.

The Petitioner, in short, proposes that this Honorable Court undertake discretionary review of a matter never raised in state courts, overrule the conclusion of state appellate courts on an evidentiary matter based upon state law, and then answer a question never raised in its *White* Opinion – an Opinion which is, in fact, in every sense, whole-heartedly supportive of the state court determinations below.

IV. CONCLUSION

WHEREFORE, upon the basis of Petitioner's failure to preserve the issue presented in any court below, his failure to state a federal question and his failure to demonstrate anything in this Court's *White* Opinion suggesting the appropriateness of discretionary review, the Commonwealth of Pennsylvania respectfully requests that Petitioner's Petition of Writ of Certiorari to the Superior Court of Pennsylvania be denied by this Honorable Court.

Respectfully submitted,

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